BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MILTON C. WILSON	)	
Claimant	)	
VS.	)	
	)	
LIQUID ENVIRONMENTAL SOLUTIONS	)	Docket Nos. **1,056,730 &**
Respondent	)	**1,056,731**
AND	)	
	)	
NEW HAMPSHIRE INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and insurance carrier request review of the March 14, 2012, preliminary hearing Order entered by Administrative Law Judge (ALJ) Steven J. Howard. Kathleen A. McNamara of Kansas City, Missouri, appeared for claimant. Heather E. Hutsell of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the preliminary hearing transcript, with exhibits, dated March 13, 2012, and all pleadings contained in the administrative file.

ISSUES

The ALJ ordered respondent to provide an authorized physician to treat claimant's injuries for a date of accident of January 28, 2011.[1] The following issues are presented for Board review:

(1) Whether claimant suffered an accidental injury arising out of and in the course of employment with respondent;[2]

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[1] The ALJ's preliminary hearing Order specifies that treatment be provided with Lanny Harris, M.D., however, an Amended Order, approved by both counsel of record, was entered on March 13, 2012, ordering treatment with Dr. Allen Guinn instead of Dr. Harris.

[2] Although respondent raised this issue in its application for Board review, it was not argued in respondent's brief. The issue was arguably thereby abandoned. However, since the issue was included in the application for Board review, the undersigned Board member will nevertheless address that issue.

(2) Whether the ALJ exceeded his jurisdiction in ordering preliminary relief;

(3) Whether the Board has jurisdiction to consider certain issues raised by respondent.

Respondent argues the ALJ erred in ordering respondent to provide medical treatment for an accidental injury that was not the subject of claimant's applications for preliminary hearing and thus was not properly before the ALJ. Consequently, respondent maintains the ALJ exceeded his jurisdiction and the preliminary hearing order should be reversed.

Claimant argues that his last day worked, January 28, 2011, is the proper accident date for the two claims pending on review. Claimant contends the ALJ's Order should accordingly be affirmed.

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

The dates of accident for the claims currently on appeal are March 16, 2011, in Docket No. 1,056,730 and a series of accidents from August 3, 2010 through January 27, 2011, in Docket No. 1,056,731. The applications for hearing in both Docket Nos.1,056,730 and 1,056,731 allege injuries consisting of bilateral carpal tunnel syndrome and ulnar neuropathy resulting from the repetitive use of the arms and hands.

Claimant has two other claims pending before the Division of Workers Compensation, however, the record does not show that applications for preliminary hearing were filed in either of those claims. A January 28, 2011 date of accident was docketed under No. 1,054,745. Claimant's fourth claim was docketed under No. 1,054,744, with a date of accident of August 13, 2010. Docket Nos. 1,054,744 and 1,054,745 were not considered by the ALJ at the preliminary hearing, nor are they now before the Board.

Milton Wilson, who is approximately age 56, was employed by respondent as a service technician. He commenced employment for respondent on January 19, 2009. His job required that he drive a truck to various locations, including retail stores and restaurants, to service waste water-grease traps. Claimant's testimony contains a detailed description of the physical requirements of his job. It would serve no purpose to specify those requirements here. Suffice it to note that claimant's position required repetitive and forceful use of his hands and arms.[3]

[3] P.H. Trans. at 8-12.

Claimant developed numbness in both hands as well as tingling in his fingers bilaterally. He also experienced aches and pain in his upper extremities. As a result, claimant experienced difficulty writing and gripping. Claimant had no problems with his arms and hands before January 28, 2011, the last day he worked for respondent.

Dr. Poppa evaluated claimant as the request of his counsel on November 3, 2011. Following the taking of claimant's history, reviewing medical records, and conducting a physical examination Dr. Poppa concluded:

> Mr. Wilson's bilateral upper extremity carpal tunnel symptoms did not occur as a result of his work injury dated 1/28/11. However, from a medical standpoint, it is my opinion that as a result of continual and repetitive use of his hands and arms at work performing his job duties, he did develop and aggravate his preexisting bilateral elbow cubital tunnel syndromes and did develop bilateral carpal tunnel symptoms as a result of his employment at Liquid Environmental Services. Mr. Wilson should request treatment for his bilateral elbows and wrists through work comp.[4]

An EMG test conducted on March 16, 2011, revealed evidence of median nerve entrapment at both wrists, compatible with bilateral carpal tunnel syndrome, and ulnar nerve entrapment at both elbows, consistent with bilateral cubital tunnel syndrome.

Dr. Erich Lingenfelter examined claimant on May 11, 2011, and again on March 7, 2012. He diagnosed claimant with mild cubital tunnel and carpal tunnel syndromes as well as a high-grade partial thickness rotator cuff tear of the right shoulder. Dr. Lingenfelter performed a right shoulder arthroscopy on September 30, 2011. The doctor did not feel claimant's bilateral carpal tunnel syndromes or cubital tunnel syndromes resulted from a slip and fall accident on January 28, 2011. Dr. Lingenfelter stated:

> The most common cause of carpal tunnel syndrome is flexor tenosynovitis and the EMG and ulnar neuritis can coexist because of similar issues, particularly repetitive flexion and extension as well as repetitive loading.[5]

Dr. Lingenfelter also stated:

> I have also been made aware that there is some potential claim for repetitiveness causing his carpal tunnel syndrome and his ulnar neuritis. I have reviewed carefully what he does and discussed this with him in detail and I see no evidence that that would cause the carpal tunnel symptoms that he is complaining of, no more than

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[4] *Id.*, Cl. Ex.1 at 9.

[5] *Id.*, Resp. Ex. A at 5.

> anybody in the general population that does some type of non office work, nor do I see any relationship to the fall. I am quite confused why he initially did not complain of these symptoms as significant when I initially saw him and related it to one injury, and then now comes back with another injury. . . . There is absolutely no objective evidence or anything to support that his job has caused carpal tunnel syndrome or ulnar neuritis.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[6] Whether an accident arises out of and in the course of the worker's employment depends upon the facts of the particular case.[7] The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase 'out of' employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises 'out of' employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises 'out of' employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase 'in the course of' employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[8]

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[6] K.S.A. 2010 Supp. 44-501(a).

[7] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[8] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 198-99, 689 P. 2d 837 (1984); *Newman v. Bennett*, 212 Kan. 562, 512 P. 2d 497 (1973).

K.S.A. 44-534a restricts the jurisdiction of the Board to consider appeals from preliminary hearing orders to the following issues:

(1) Whether the employee suffered an accidental injury;

(2) Whether the injury arose out of and in the course of the employee's employment;

(3) Whether notice is given or claim timely made;

(4) Whether certain defenses apply.

These issues are considered jurisdictional and subject to review by the Board upon appeals from preliminary hearing orders. The Board can also review a preliminary hearing order entered by an ALJ if it is alleged the ALJ exceeded his or her jurisdiction in granting or denying the relief requested.[9]

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[10] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[11]

ANALYSIS

Pursuant to K.S.A. 44-534a(a)(2) the Board has jurisdiction to review the ALJ's finding that claimant suffered personal injury by accident arising out of and in the course of claimant's employment with respondent. Although the preliminary hearing order does not explicitly make a finding on that issue, it is implicit in the ALJ's conclusion that respondent must provide claimant with authorized medical treatment.

The two claims which were properly before the ALJ, and which are now before the Board, allege injuries to the upper extremities as a consequence of repetitive use of the hands and arms. In Docket No. 1,056,730 the date of accident claimed is March 16, 2011, the day claimant underwent EMG testing which revealed bilateral carpal tunnel and

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[9] See K.S.A. 2010 Supp. 44-551(i)(2)(A).

[10] K.S.A. 44-534a.

[11] K.S.A. 2010 Supp. 44-555c(k).

bilateral cubital tunnel syndromes. In Docket No. 1,056,731 the alleged accident date is January 28, 2011, the last day claimant worked for respondent.

Claimant described in some detail the physical requirements of his job for respondent. That description is undisputed. Among other activities, claimant's job required repetitive use of his hands and arms in driving a commercial truck with a 6,000-gallon tank; in lifting and moving hoses; in gripping required to clamp and unclamp hoses; and using pry bars and sledge hammers. Claimant developed pain, numbness, and tingling in the upper extremities and experienced difficulty gripping and writing. There is no evidence which suggests claimant's development of bilateral carpal and cubital tunnel syndromes resulted from a cause other than the repetitive and forceful use of the upper extremities required by claimant's job.

Dr. Poppa's report supports the finding that claimant's bilateral median nerve entrapment at the wrist and ulnar nerve entrapment at the elbow were caused by the nature and requirements of claimant's work duties. Dr. Lingenfelter stated that he "reviewed carefully what [claimant] does and discussed with this with him in detail and I see no evidence that that would cause the carpal tunnel symptoms that he is complaining of, **no more than anybody in the general population that does some type of non office work; . . .**"[12] (Emphasis supplied) Dr. Lingenfelter also opines that the EMG and ulnar neuritis can coexist because of similar issues, "particularly repetitive flexion and extension as well as repetitive loading."[13] It is improbable that Dr. Lingenfelter had a detailed discussion with claimant about claimant's job without noting the repetitive and forceful use of the upper extremities which the undisputed evidence establishes his position required. Dr. Lingenfelter's comment about other workers in the general population performing non office work is not credible. The notion that the repetitive gripping, grasping, holding, carrying, and lifting required by claimant's job is common to all workers who don't work in an office environment is erroneous. Therefore, this Board member finds claimant has proven by a preponderance of the evidence that he sustained personal injuries to his wrists and elbows by repetitive accidents arising out of and in the course of his employment with respondent.

The other issue raised by respondent is whether the ALJ erred in ordering respondent "to pay benefits for an accidental injury which was not the subject of the application for preliminary hearing and thus not properly before the court[.]"[14] The Board has no jurisdiction to review this issue. The issue is not one enumerated in K.S.A. 44-534a(a)(2). The ALJ did not exceed his jurisdiction in finding claimant's date of accident

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[12] *Id.*, Resp. Ex. A at 2.

[13] *Id.*, Resp's Ex. A at 5.

[14] Respondent's brief at 1 (filed April 16, 2012).

for the series of repetitive traumas to the upper extremities was January 28, 2011, the date claimant last worked for respondent. The question is not whether the ALJ was or was not correct in determining the date of accident for claimant's series of repetitive traumas but is rather whether the ALJ exceeded his authority in making a finding on that issue.

Respondent's argument boils down to this: Because the ALJ found the date of accident for claimant's alleged series of repetitive injuries to the upper extremities was January 28, 2011, which happens to be the same date of a slip and fall accident alleged in another docket number (1,054,745), the ALJ exceeded his authority by ordering benefits in a claim which was not properly before the court for a preliminary hearing.

The ALJ was well within his jurisdiction in determining the date of accident in the two claims which were before him. The date of accident is a question of fact and the finder of fact is not bound by the allegations in the pleadings.[15] In *Allen*,[16] the Kansas Court of Appeals stated:

> Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.

The Board has no jurisdiction to review determinations by the ALJ of the date of accident at this stage of claim unless the outcome of another compensability issue depends on such a finding.[17] When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.[18]

CONCLUSION

(1) Claimant sustained personal injury to her wrists and forearms by a series of repetitive traumas which arose out of and in the course of her employment with respondent.

(2) The ALJ did not exceed his authority in determining the date of accident in claimant's series of repetitive traumas. This issue is accordingly dismissed by the Board for lack of jurisdiction.

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[15] *Crouse v. O'Reilly Auto Parts*, No. 259,606 2001 WL 507214 (Kan. WCAB Apr. 16, 2001)

[16] *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

[17] *Milham v. Boeing Co.*, No. 1,001,547 2002 WL 31103945 (Kan. WCAB Aug. 19, 2002).

[18] See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

WHEREFORE, the undersigned Board Member dismisses for lack of jurisdiction respondent's application for review to the extent that it alleges the ALJ exceeded his authority in awarding benefits. The March 14, 2012, preliminary hearing Order entered by ALJ Steven J. Howard is otherwise affirmed.

IT IS SO ORDERED.

Dated this 6th day of July, 2012.

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GARY R. TERRILL
BOARD MEMBER

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Steven J. Howard, Administrative Law Judge